United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7457

To be argued by
Carl E. Person
(10 Minutes)

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CARL E. PERSON,

Plaintiff-Appellee,

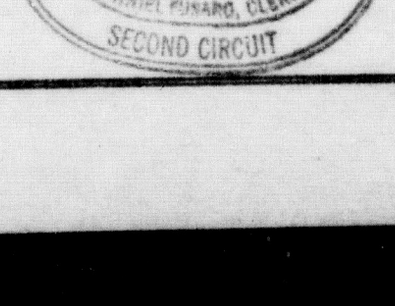
-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLEE



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and ATTORNEY GENERAL OF NEW YORK STATE,
:

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BRIEF OF PLAINTIFF-APPELLEE

PRELIMINARY STATEMENT

Plaintiff, an attorney appearing pro se, moved for a summary judgment declaring unconstitutional Disciplinary Rule 7-109C (which prohibits lawyers from using expert witnesses on a contingent-fee basis, however reasonable) and rules of the First and Second Appellate Divisions of the Supreme Court of the State of New York incorporating the prohibition of DR 7-109C. Judge John F. Dooling, Jr. granted the motion for a summary declaratory judgment, and judgment was entered accordingly. All defendants have appealed other than The Association of the Bar of the City of New York (the "City Bar Association").

Judge Dooling's supporting opinion, dated June 25, 1976, is reported at 414 F.Supp. 144 (JA148). A prior supporting opinion by Judge Dooling, dated March 24, 1976, is reported at 414 F.Supp. 139, 142-144 (JA73).

STATEMENT OF THE ISSUES

1. Whether an attorney representing plaintiffs in a massive private antitrust action (who are unable to afford needed expert witnesses) presents a case or controversy in his action against persons who adopted and enforce a rule prohibiting him from using expert witnesses on a contingent-fee basis.

2. Whether the District Court acted properly in summarily adjudging the unconstitutionality of DR 7-109C because defendants raised no material factual issues.

3. Whether DR 7-109C is irrational and discriminatory against plaintiff and his clients without justification.

4. Whether DR 7-109C is unconstitutional as an infringement of plaintiff's rights under the First Amendment.

5. Whether DR 7-109C is unconstitutional as a denial of due process and equal protection under the Fourteenth Amendment.

STATEMENT OF THE CASE

(1)

A brief statement of the nature of the case, the course of proceedings and the determination of the court below is contained in defendants' brief, at pp. 3-5. It should be noted that defendants-appellants say they are appealing only because of the judgment specifically referring to the Appellate Division Rules. If the judgment had not explicitly affected such rules, no appeal would have been taken from the judgment declaring DR 7-109C unconstitutional (JA164). Defendant City Bar Association is not appealing from the judgment declaring DR 7-109C unconstitutional.

During July-August, 1976, plaintiff sought and obtained dismissal of the portion of his complaint relating to the sale of shares in lawsuits. A judicial determination of these matters became unnecessary. After Judge Dooling's opinion of March 24, 1976 (JA73-87), plaintiff's antitrust client Christian Thee filed for a Regulation A public offering of shares in his action against Parker Brothers and others. The Securities and Exchange Commission declared the public offering effective for sale on July 23, 1976 (JA160).

(2)

Plaintiff, an antitrust attorney, represents various clients in their antitrust actions against major corporations (JA45, JA56, JA93). Antitrust actions are vital to the country. The concentration of wealth in this country is at a dangerously high level (JA43-44). The nation's

form of government depends on how effective the nation's antitrust laws are enforced (JA44, JA53). Thus, enforcement of the antitrust laws has substantial political ramification in this country.

Antitrust litigation against major corporations is often long and costly. For an antitrust plaintiff and his lawyer to prevail in a meritorious case the clients must have substantial resources available to spend in the litigation (JA46, JA53). Plaintiff's Nabcor Clients do not have such resources and this has forced plaintiff into obtaining ways to reduce the out-of-pocket costs of their antitrust litigation, essentially through the sale of shares and through the use of expert witnesses on a contingent-fee basis (JA45-46).

The Nabcor Action, pending in the Southern District of New York before Judge Thomas P. Griesa, requires a substantial amount of services by expert witnesses, including their expert testimony (JA101-102). The Nabcor Plaintiffs cannot afford to pay for the services of the expert witnesses needed in their action (JA46, JA94, JA106). Leading expert witnesses quoted $50,000 (Arthur D. Little & Co.) and $40,000 to $60,000 (The Elmo Roper Organization) as their fees for performing requested expert services for the Nabcor Plaintiffs (J104-107). Plaintiff and his clients could not use expert witnesses needed by them in the Nabcor Action because of the inability of the Nabcor Plaintiffs to pay experts' fees (JA94, JA103, JA107-110). This resulted in loss of a preliminary injunction motion (JA108-109). Three prospective expert witnesses (Spector, Siegel and Seplaki) have advised plaintiff they would be willing

to perform expert services and testify as expert witnesses for the Nabcor Plaintiffs on a contingent-fee basis, assuming DR 7-109C was not a barrier, but wanted to learn more about the merits of the Nabcor Action before deciding to enter into an agreement to provide the services (JA103, JA110, JA113). Such caution should be anticipated by persons who expect to be paid based on the merits of the case rather than on false testimony.

The United States Justice Department and the New York Attorney General enforce the federal and New York antitrust laws on a discretionary basis, and rely substantially on private actions to assist in enforcing those laws (JA51-55). Both the Justice Department and New York Attorney General have refused to bring any civil or criminal actions against any of the persons who plaintiff and his Nabcor clients allege conspired against the Nabcor Plaintiffs (JA51, JA63). These refusals were the exercise of discretion by the Justice Department and New York Attorney General, and constituted political acts (or inaction), as distinguished from ministerial acts. The decision by plaintiff to represent the Nabcor Plaintiffs in their antitrust action was a discretionary, political act by plaintiff, as his means of political self-expression, through litigation (JA46-47, JA56, JA57-58).

Because of the high cost of retaining needed expert witnesses, and the existence of DR 7-109C (prohibiting attorneys from using expert witnesses on a contingent-fee basis), plaintiff and his Nabcor clients are unable in plaintiff's professional opinion to obtain substantial justice in their private antitrust actions (J45-47).

The Code of Professional Responsibility, including DR 7-109C, was adopted by the American Bar Association ("ABA") in 1969, effective January 1, 1970; it was adopted by the New York State Bar Association ("State Bar Association") effective January 1, 1970; then it was automatically adopted and/or enforced by the City Bar Association and by the two Appellate Divisions, all without New York legislative input or review. No alternatives were considered, and no balancing of interests was attempted.

The ABA, State Bar Association and City Bar Association are dominated or controlled by partners in law firms representing major business interests which benefit from the adoption and enforcement of DR 7-109C (JA47, JA104). The Rule inhibits persons such as plaintiff and his antitrust clients from proving meritorious antitrust claims against these same major companies. Furthermore, these business interests have combined on a political-action basis (through The Business Roundtable) to inhibit effective antitrust law enforcement (JA47-50, JA56-58), and are even financing litigation for companies not members of The Business Roundtable (JA50).

The defendants filed no affidavits in opposition to the plaintiff's affidavits (other than attorneys' affidavits). Also, the defendants have failed to seek any discovery whatsoever, particularly any discovery under Rule 56(f), F.R.Civ.P. Apparently, the defendants wanted to avoid the raising of any triable issues of fact. Although defendants now claim they unsuccessfully sought discovery (Brief, p. 24),

the record clearly shows this is not the case (JA1-1a). The District Court's decision, in the words of defendants-appellants (Brief, p. 5) "was based exclusively on the affidavits of plaintiff and the pleadings", and this was properly so.

It should be noted that plaintiff's complaint defines each defendant "Appellate Division" to mean the "7 Justices of the Supreme Court" (JA4). Also, plaintiff alleged in his complaint that "Each of the defendants described ... is sued in an individual capacity and not as a governmental official or body" (JA5).

It should also be noted that no statute or court rule in New York prohibits a party in a lawsuit from employing an expert witness on a contingent-fee basis. The only prohibition is DR 7-109C, which prohibits attorneys from employing expert witnesses on a contingent-fee basis.

ARGUMENT

I.

AN ATTORNEY REPRESENTING PLAINTIFFS IN A MASSIVE PRIVATE ANTITRUST ACTION (WHO ARE UNABLE TO AFFORD NEEDED EXPERT WITNESSES) PRESENTS A CASE OR CONTROVERSY IN HIS ACTION AGAINST PERSONS WHO ADOPTED AND ENFORCE A RULE PROHIBITING HIM FROM USING EXPERT WITNESSES ON A CONTINGENT-FEE BASIS

Plaintiff has shown without contradiction that he is the attorney for various plaintiffs (the "Nabcor Plaintiffs") in a massive antitrust suit in the federal courts; that plaintiff and the Nabcor Plaintiffs are in substantial need of preparation and testimony by expert witnesses in various phases of the Nabcor action; that the defendants in the Nabcor action have already used expert witnesses and that plaintiff and the Nabcor Plaintiffs have already suffered defeat in their litigation because of their financial inability to retain expert witnesses to oppose the expert witnesses of the defendants therein; that additional need for expert testimony will arise; that expert witnesses are available to plaintiff and the Nabcor Plaintiffs on a contingent-fee basis, subject to learning more about the Nabcor action; that DR 7-109C prevents plaintiff and the Nabcor Plaintiffs from entering into any agreements with expert witnesses because of the impediment or futility of spending valuable time to reach such an agreement when the agreement itself could not be performed because of the existence of DR 7-109C.

As Judge Dooling in his Memorandum and Order stated:

> "The posture of such a case as this is, inevitably, unusual. The Rule, unless ignored, must of itself foreclose a lawyer's effort to obtain expert testimony and go far to

> deny to the lawyer the opportunity to demonstrate the availability of such testimony and its specific place in particular cases. But plaintiff has shown without contradiction that in his prosecution of the Nabcor case he is disadvantaged in being unable to retain needed accounting and economic testimony because of his clients' lack of funds and the inhibition of the Rule. The plaintiff has shown, without contradiction, that in his type of practice the predicament is recurrent from case to case. It is the plaintiff who is the one directly restricted by the Rule and rendered less effective than, in his reasonable judgment, he would be if able to seek out expert testimony uninhibited by the contraint of the Rule so far as it outlaws compensation upon the outcome of the case." (JA149-150).

Plaintiff has ascertained that he and his clients cannot afford to pay the amounts demanded by expert witnesses, and plaintiff has done all he can do reasonably and rationally to demonstrate availability of expert witnesses who would testify on a contingent-fee basis. Any agreement would be difficult to obtain because of the expenditure of time required to make the requested commitment, with all parties knowing that the agreement at present could not be fulfilled by either party because of DR 7-109C. Furthermore, any such agreement made during the existence of DR 7-109C would be suspect anyway, because of the ease with which the expert witness could withdraw from the "agreement", if he so desired. Consequently, plaintiff has taken the matter as far as he reasonably could go, by demonstrating that he has expert witnesses who are willing to spend their valuable time in learning more about the Nabcor Action for purposes of entering into an agreement to provide services, on a contingent-fee basis, assuming DR 7-109C was no barrier.

Accordingly, plaintiff has presented an actual (i.e., non-hypothetical) case or controversy to the District Court under 28 U.S. § 2201 (declaratory judgments). There is sufficient immediacy and reality to warrant issuance of the declaratory judgment. Zwickler v. Koota, 389 U.S. 241 (1967), p. 244, n. 3. In line with the Zwickler opinion, declaratory judgment actions are to be decided on a case-by-case basis. Mobil Oil Corp. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO, 483 F.2d 603, 607 (5th Cir. 1973), mod. on other grounds, 504 F.2d 272.

II.

THE DISTRICT COURT ACTED PROPERLY IN SUMMARILY ADJUDGING THE UNCONSTITUTIONALITY OF DR 7-109C BECAUSE DEFENDANTS RAISED NO MATERIAL FACTUAL ISSUES

Defendants deliberately filed no affidavits in opposition to plaintiff's motion (other than attorneys' affidavits) and chose not to seek or obtain any discovery, apparently to avoid raising any triable issues. They were willing to rely upon the factual record created by plaintiff. Now they claim that discovery could have permitted them to raise triable issues and avoid summary relief. Defendants have waived any discovery they might have had and must be content with the factual record created by plaintiff in the District Court below. This record has uncontradicted evidence more than sufficient to support the summary declaratory judgment.

Plaintiff has shown without contradiction that DR 7-109C is irrational (see Point III, immediately below) and that the Rule was adopted by Plaintiff's competitors in the law, as representatives of competitors of plaintiff's antitrust clients. Also, plaintiff has demonstrated that the Rule creates a substantial handicap for plaintiff and his clients in their antitrust litigation, without justification, and does not prohibit certain kinds of contingent compensation for expert witnesses (also see Point III). Expert witnesses used by the same attorneys have a contingency of anticipated future employment which is not barred or regulated by the Rule and could be more productive of false testimony than the hundred or one thousand dollars of contingent fees barred by DR 7-109C. Accordingly,

the Rule is irrational and discriminates against plaintiff and his clients without justification. In Point IV below there is a discussion of various ways that contingent compensation can be paid under the Rule today.

III.

DR 7-109C IS IRRATIONAL AND DISCRIMINATORY AGAINST PLAINTIFF AND HIS CLIENTS WITHOUT JUSTIFICATION

A discussion of the irrationality and discrimination inherent in DR 7-109C is contained in Judge Dooling's opinion (JA148), which will not be repeated here. Also, DR 7-109C does not prohibit all types of contingent compensation for expert witnesses. For example, accounting firms which perform expert witness services for the same client or clients of the same law firm are not disqualified under the Rule irrespective of how much business they have had in the past and can expect to obtain in the future from these same persons. Thus, their testimony is subject to the same or greater influence of future compensation contingent on the content of their testimony as the expert witness who is barred from a direct contingent fee of as little as $1 or $100. The discrimination favors wealthy litigants, and the difference in outcome is irrational. To achieve the alleged desired protection from false testimony, all expert witnesses should be free from economic dependence on and/or reprisals by the parties for whom they testify. Additional reasons for holding that the Rule is irrational and discriminatory without justification are set forth under Point IV immediately below.

Also, the Rule is discriminatory because it applies only to clients with attorneys and not to clients appearing pro se. A party not represented by an attorney is free to use expert witnesses on a contingent-fee basis (assuming full disclosure to court, adverse counsel and any jury, presumably). There is no prohibition in statute or court rule in New York.

Whether contracts would be enforceable or not under prior law is irrelevant. The existence of the Rule prohibits plaintiff from entering into and performance of any contract to test enforceability. Furthermore, it is not at all clear that such contracts are illegal as a general proposition under New York law. The First Department said, in Marine Midland Trust Co. of New York v. Forty Wall Street Corp., 13 A.D.2d 118, 213 N.Y.S.2d 689 (1st Dept. 1961):

> "While some of the general pronouncements in these New York cases might seem to stamp all contingent fee arrangements made with a witness illegal and as against public policy, each case turned on some unconscionable circumstance that is not even suggested in connection with the retention of the two appraisers whose allowances are under review. ... There is nothing in the record to indicate they were hired to advise and testify as to anything but their honest opinions as to the value of the property. They had no hand in fostering the litigation; and their compensation was not fixed between them and the parties in any sum or percentage dependent upon success, but was to be in an amount allowed by the court. This amount presumably would be reasonable and not immoderate, and would reflect, among other things, the experience, skill and standing of the appraisers, the contribution they made to the litigation complex in reaching a right result, and the time expended. ..." 213 N.Y.S.2d 696-697.

Also, the Marine Midland court pointed out:

> "... Nevertheless, accountants, and less often, appraisers, have been consistently, without demur, awarded allowances in derivative actions and their variants on a contingency basis. As in the case with lawyers, stockholders or bondholders suing in derivative actions or Burchill Act

> proceedings cannot undertake to pay the substantial fees earned by accountants, appraisers and experts in other fields. In such litigation the complaining security holder seldom possesses the ability to match the enormous resources of management, which can commit itself to the payment of large fees absolutely. And yet, without the services of such experts, meritorious cases may be prejudiced seriously or destroyed.
>
> "Except for a long-standing, unarticulated acquiescence in payment of contingent fees to experts for these pragmatic reasons, there appears to be no body of law relating specifically to this subject. ..." 213 N.Y.S.2d 695-696. Emphasis added.

It seems clear that New York has no clear-cut policy against witnesses testifying on a contingent-fee basis, but permits such testimony in various instances at least in conflict with DR 7-109C. DR 7-109C, therefore, does not express any State policy concerning witnesses testifying on a contingent-fee basis. All the Rule does is prohibit a person from using expert witnesses on a contingent-fee basis if the person is represented in court by an attorney, which seems totally illogical.

IV.

DR 7-109C IS UNCONSTITUTIONAL AS AN INFRINGEMENT OF PLAINTIFF'S RIGHTS UNDER THE FIRST AMENDMENT

The Bar Association's alleged justification for DR 7-109C is derived from Canon 7 of the Code of Professional Responsibility, which provides:

> "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"

Ethical Consideration 7-28 under Canon 7 provides:

> "Witnesses should always testify truthfully[47] and should be free from any financial inducements that might tempt them to do otherwise.[48] A lawyer should not pay or agree to

pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.[49]"

Notes 47-49 to EC 7-28 provide:

"47. Cf. ABA Canon 39."

"48. 'The prevalence of perjury is a serious menace to the administration of justice, to prevent which no means have as yet been satisfactorily devised. But there certainly can be no greater incentive to perjury than to allow a party to make payments to its opponents' witnesses under any guise or on any excuse, and at least attorneys who are officers of the court to aid it in the administration of justice, must keep themselves clear of any connection which in the slightest degree tends to induce witnesses to testify in favor of their clients.' In re Robinson, 151 App. Div. 589, 600, 136 N.Y.S. 548, 556-57 (1912), aff'd, 209 N.Y. 354, 103 N.E. 160 (1913).

"49. 'It will not do for an attorney who seeks to justify himself against charges of this kind to show that he has escaped criminal responsibility under the Penal Law, nor can he blindly shut his eyes to a system which tends to suborn witnesses, to produce perjured testimony, and to suppress the truth. He has an active affirmative duty to protect the administration of justice from perjury and fraud, and that duty is not performed by allowing his subordinates and assistants to attempt to subvert justice and procure results for his clients based upon false testimony and perjured witnesses.' Id., 151 App. Div. at 592, 136 N.Y.S. at 551."

The foregoing is the defendants' justification (prepared by the ABA and adopted and/or enforced by defendants) for adoption and enforcement of DR 7-109C.

Note 90 to DR 7-109 provides:

"90. See In re O'Keefe, 49 Mont. 369, 142 P. 638 (1914)."

In re O'Keefe is irrelevant, dealing with the purchase of testimony from persons who actually witnessed an incident take place. As such, they were not expert witnesses. The court recognized that distinction, at 49 Mont. 377.

ABA Canon 39 was originally adopted on July 26, 1928 and stated:

> "Compensation demanded or received by any witness in excess of statutory allowances should be disclosed to the court and adverse counsel. If the ascertainment of truth requires that a lawyer should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interests of his client."

In 1937, Canon 39 was changed to read:

> "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial or on the witness stand."

In 1969, the ABA adopted the Code of Professional Responsibility, including DR 7-109C, effective January 1, 1970, which was subsequently adopted by the New York State Bar and, automatically, by the City Bar Association and the defendant Appellate Division Justices.

The foregoing suggests that DR 7-109C was intended to reduce the possibilities for perjury and fraud by witnesses during a trial, and to prevent the suppression of truth, when the party calling the witness is represented by an attorney. But the Rule woefully fails to meet such heightened objectives and creates far more obstacles for

obtaining justice than it overcomes. These obstacles appear to have been overlooked by the ABA, State Bar Association and defendants, and compel a determination that DR 7-109C is violative of the 1st and 14th Amendment rights of plaintiff and his antitrust clients. DR 7-109C is in excess of the State's interest in reducing opportunities for perjury and fraud during trials for various reasons, as follows:

1. The ABA, State Bar Association, City Bar Association, Appellate Divisions and New York State Legislature did not:

(a) perform any balancing of the interests of the State against the interests of the public, plaintiff and plaintiff's antitrust clients under Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975) or any balancing came out in favor of declaring the Rule unconstitutional;

(b) weigh alternatives to the total prohibition on use by attorneys of expert witnesses on a contingent-fee basis;

(c) consider the adverse and discriminatory effect resulting from application of the Rule against a party to a lawsuit only if he is represented by an attorney; or

(d) consider whether a hearing could be held before the Court to determine a party's need to use an expert witness on a contingent-fee basis and if so the reasonableness of the proposed contingent-fee compensation, as an alternative to the total prohibition.

Plaintiff believes that the following method of contingent compensation is reasonable and should not be prohibited: Agreement to compensate the expert witness out of any recovery in an amount to be determined by the court, after the trial is completed, based upon standards similar to those enunciated by the Marine Midland court, pp. 13-14 above. The standard would be reasonableness, and could take into account the amount paid to defendants' expert witnesses, adjusted to reflect the contingency.

2. Neither version of Canon 39 considered the problem of payment of contingent fees to expert witnesses, although the 1928 version indicates that any such arrangements would have to be disclosed to the court, adverse counsel, and presumably any jury. Otherwise, the problem does not appear to have been considered by the draftsmen of Canon 39.

3. By adopting DR 7-109C, the ABA expressly prohibited use by attorneys of any expert witnesses on a contingent-fee basis of any kind. The authority or justification for such apparent total prohibition was In re Robinson, cited above at p. 15, which did not involve any expert witnesses. The case involved, instead, pure and simple bribes paid to non-expert witnesses, court officials and experts for the opponents (for the purpose of having them perjure themselves). The case did not involve contingent compensation to be paid to expert witnesses for the attorney and party paying the compensation.

4. In re Robinson cited Matter of Schapiro, 144 App. Div. 1 (1st Dept. 1911), in which the court disbarred an attorney who entered into an agreement with his client's physician to pay the physician a

portion of the attorney's contingent fee in exchange for perjured testimony about his treatment of the client. The physician had testified falsely during the trial that he had no interest in the case, and the attorney was unable to establish liability without this particular doctor's testimony. This arrangmenet was carried out by the attorney, doctor and client

> "without calling the attention of the court or the witness to the agreements that had been made and which the witness had in his possession at the time." 144 App. Div. 6.

The court said, in addition:

> "Having made such agreements his obligation to the court and to the public required that he should have called the attention of the court to the fact that such agreements existed so that the jury in considering the testimony of the physician could understand that he was interested in the recovery." (141 App. Div. 11).

The court in dictum did condemn any arrangement with an expert witness:

> "where the amount to be paid is to depend upon the testimony that he is to give and where his right to compensation depends upon the result of the litigation in which he testifies." 141 App. Div. 10.

This dictum seems to condemn compensation arrangements with an expert witness which provide for increased or reduced compensation according to the extent the witness falsifies his testimony. The dictum does not say that all contingent-fee arrangements would be illegal, and never considered the reasonableness, under various circumstances, of some types of contingent-fee arrangements.

5. It seems clear from the foregoing that no balancing of interests was undertaken by anyone concerning the prohibition against use by attorneys of expert witnesses on a reasonable contingent-fee basis, particularly in connection with costly antitrust litigation.

6. The prohibition suggests two premises: (a) that professional or other expert witnesses with a financial interest however small and reasonable in the outcome of the litigation would tend not to tell the truth to a substantially greater extent than expert witnesses who testify for $500 or $1,000 per day, for example, paid (and often adjusted) after the testimony; and (b) that disclosure of the financial interest to the trier of fact (similar to the disclosure of an expert's non-contingent fee) would not adequately compensate for the expert witness' financial interest. There is nothing shown to support either premise, and the second premise (disclosure inadequacy) is contrary to the language of the Schapiro case quoted above used to justify the Rule (through citation in the Robinson case).

7. Also, the Rule does not appear to prohibit attorneys from using other witnesses (expert or otherwise) who would have other types of contingent financial interests in the outcome of the action, such as:

(a) a party himself;

(b) relatives dependent on a party;

(c) relatives expecting to inherit from a party;

(d) business partners or associates of a party;

(e) creditors of a party;

(f) employees of a party anticipating a bonus dependent on future earnings, which are dependent on the outcome of the action;

(g) a professional expert witness who reasonably expects to lose future "business" (testimony in other cases) with the party or his counsel now using him;

(h) an accounting firm which reasonably expects to lose future profits from lost accounting business with the party or his counsel now using it;

(i) a spouse, fiancee or fiance or intimate friend of a party deriving economic benefits from the relationship; and

(j) a shareholder or director of a corporate party.

Any of these persons could have a substantial direct or indirect interest in the outcome of an action and their testimony would be allowed, apparently, subject to disclosure of the relationship. Even an expert's non-contingent compensation is disclosed. There is no showing by defendants that a person with even the smallest amount of contingent interest is more apt to perjure himself than any of the witnesses described above, who are permitted to testify.

8. During the trial of an antitrust action, one of the "Big Eight" accounting firms is ordinarily called as an expert witness, for substantial compensation. Such firm ordinarily has substantial business relationships with either the employing party, its counsel or companies affiliated with either, and has the ever-present realistic threat of loss of future accounting business (perhaps worth many

millions of dollars to the accounting firm in future profits and which may well carry many more millions of dollars in overhead expenses which cannot be reduced during the short run), which contingent amount seems far greater than a few thousand dollars (or other reasonable amount) to be paid by an impecunious antitrust plaintiff to his own expert witness in the event the plaintiff should win his antitrust action. The State did not appear to concern itself with this inequality of treatment, other than to approve it for the benefit of the major corporate clients of the leading law firms dominating the bar associations, who can afford to lay out large sums for expert witnesses. The rule could easily have been written to say that no expert witness shall be called by a party or his attorney if either has any actual or prospective business relationships of any kind with the expert witness. By not so doing, the rule is unfairly and irrationally discriminating against plaintiff and his clients.

9. The threat of loss of business profits is not the only major contingency upon which the major accounting firm is testifying. Any withdrawal of business could cause a severe loss relating to overhead expenses which may not be able to be reduced (after loss of business) in the short run, such as rented space, equipment and facilities, management personnel, support staff, and partners in the firm; and there can also be a substantial loss of stature in the accounting industry if one of the Big Eight loses a major account. The amount at stake for these expert witnesses for the defense is far more substantial to them in many cases than the amount at stake on a contingent basis to the expert witness to be called by many plaintiffs in

antitrust litigation. Obviously, because of the contingent nature of the compensation, the plaintiff's expert witness would not be as dependent upon its receipt; whereas, the expert witness of the defense has already incurred his overhead and cannot suffer any loss of a substantial amount of his business as a result.

10. The prohibition in the Rule against contingent fees for experts is arbitrary because it does not discriminate against expert witnesses having an insubstantial contingent interest (such as $25 or $100 per hour and only 1 hour's testimony) and an expert witness having a substantial contingent interest (such as 10% of a multi-million dollar action, which interest may be per se unreasonable or unreasonable in certain instances).

11. The prohibition amounts to excessive regulation by the State because the amount of contingent compensation could be controlled by the courts, in fashion similar to the award of legal fees, masters' fees and certain sanctions, which apparently was not even considered by the State. Thus, the excessiveness of some contingent-fee arrangements with expert witnesses could have been controlled by the courts, instead of prohibited entirely, but this was not attempted or even considered, apparently.

12. Another alternative was not discussed, even though the Schapiro case, supra, clearly held it should have been done: The Rule could have been written to require that contingent-fee arrangements

be fully disclosed to the court, any jury and adverse counsel. There is no showing that this alternative could not had reduced any evils to the level of perjury existing with the other types of witnesses with financial interests permitted to testify (see ¶ 7 above). Upon full disclosure of the contingent arrangement, the jury or judge could determine whether, in light of the compensation promised, the expert witnesses' testimony should be given more or less credence, a factor which itself would reduce the use of experts on a contingent basis except when necessary, and then for reasonable compensation, a self-policing restraint instead of the unwarranted total prohibition imposed by the State, to the substantial detriment of plaintiff and his clients.

13. Furthermore, the prohibition fails to regulate equally or even discuss the problem of the expert witness who testifies for a specified amount of compensation promised by the party, but everyone knows (except the court and any jury) that the party cannot pay the compensation unless the case is won by that party. This relationship in fact is just as contingent as the contingent-fee arrangements prohibited by the Rule, but it appears to be allowed by the Rule without adequate explanation or any apparent balancing of interests.

14. Plaintiff is seeking the right to use expert witnesses on a contingent-fee basis solely in antitrust litigation, and the prohibition does not distinguish between different types of litigation. Enforcement of the antitrust laws through successful antitrust litigation by private parties seems far more important to the nation than encouraging other types of litigation (such as negligence or malpractice

actions). However, these types of actions already are able to obtain expert witnesses for about 1 day of testimony at reasonable rates (often advanced by the attorney without recovery from the client) and the need for any contingent fee arrangements does not appear to be present to the same substantial extent. In antitrust litigation, however, the amount of expert testimony needed is substantial, as well as the anticipated reasonable costs, assuming the experts were paid on an hourly or daily basis: Plaintiff and his clients have the need for experts which would run in excess of $100,000 up front in the Naboor Action, an amount which plaintiff's clients are totally unable to raise. The result is that the ability of plaintiff to prove the actual damages of his clients is being substantially impaired because of his inability to use expert witnesses who would testify on a reasonable contingent basis, solely because of the Rule.

15. The prohibition inhibits truthful testimony. With an interest in the outcome, an expert could be encouraged to devote more time and greater skills, to be paid in accordance with the value of his services (similar to attorneys) and subject to court review. Without such an interest, the expert may lose enthusiasm if the work takes too long or becomes too difficult (which often occurs in a professional undertaking), and the quality of his work may suffer; and the expert's enthusiasm may diminish substantially. Most of this relates to the work required of experts prior to testimony, for which substantial amounts of compensation must be paid (such as for the performance of a market study, statistically relevant sampling, or analysis of the books

and records of 10 years of business activity of a plaintiff). Thus, the prohibition creates an evil of preventing justice without any offsetting advantage to the legitimate interests of the State.

16. Defendants have made no showing that there is the same degree of perjury and fraud for all types of contingent-fee arrangements. Nor have they shown that a contingent-fee expert witness is more apt to lie than the expert witness now purchasable by the wealthy antitrust defendant for non-contingent cash fees paid up front, which expert has the possibility of loss of a substantial amount of future business and profits. The absolute nature of the prohibition seems unwarranted, in light of the flexibility with which reasonable compensation arrangements of a contingent nature could be made, the necessity of disclosure to the trier trier of fact and adverse party; and the use of the courts to control abuses. All of this should be viewed in relation to the costs of antitrust litigation (including the costs of experts) and the inability of the typical plaintiff (including plaintiff's clients in the Nabcor Action) to pursue the litigation meaningfully. Also, it should be remembered that the high costs of litigation (including costs of experts) have prevented many antitrust suits from being filed.

17. The expert testifies more as to a matter of degree and is not an indispensable witness to the events creating liability (which is where the real evil of contingent-fee compensation prohibition is directed - see Schapiro). Also, the expert witness' testimony can be refuted by experts retained and used by the defense

(which is distinguishable from the instance where a non-expert witness may be the only witness to an event creating liability, and whose testimony cannot be directly refuted by an expert witness who was not present at the time). Refutation of expert testimony by other expert testimony is capable of being done objectively, on the basis of the same information made available to both sides. No expert is indispensable and therefore the compensation payable can be arranged on a competitive basis, through selection of experts who charge lower fees, reducing the possiblities of perjury and fraud by the dictates of the marketplace.

18. Unless expert witnesses can be retained and used on a contingent-fee basis, paid experts can confuse and twist testimony to their hearts content without any fear of being detected. Such wilful misleading and confusion amounts to perjured testimony, which is being encouraged by the Rule.

In summary, plaintiff-Appellee respectfully submits that the Rule is repugnant to the 1st and 14th Amendments for lack of adequate State interest in comparison to the interests of plaintiff, his clients and the State in enforcing antitrust claims through private and governmental actions for damages. The same reasoning applies as to other litigation, but to a lesser extent in non-political litigation (such as constitutional litigation, civil rights act claims, securities litigation, and litigation arising under immigration laws - the areas where government acts on a highly discretionary basis).

Plaintiff and his clients do have a fundamental right to litigate antitrust claims under N.A.A.C.P. v. Button, 371 U.S. 415 (1963), because such litigation is a form of political expression, and perhaps the only effective means of political self-expression for plaintiff and his clients. Rather than having a group organized for many different lawsuits, plaintiff and his clients form their political association (or they assemble) on a case-by-case basis to conduct the litigation, and are entitled to First Amendment freedoms in connection therewith.

Enforcement of the antitrust laws is discretionary and political. Plaintiff's enforcement of such laws is also political, and deserving of First Amendment freedoms. Freedom of political self-expression can hardly be limited to non-profit organizations such as the N.A.A.C.P., particularly when their members are using the organizations to improve themselves economically. There is nothing more political than determining through antitrust law enforcement how the country's wealth is to be divided up and used. Political parties do not have to take a single form. Button, at 371 U.S. 431. Also, see Judge Platt's Memorandum in Person v. The Association of the Bar of the City of New York, 414 F.Supp. 133 (E.D.N.Y. 1975).

V.

DR 7-109C IS UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

Boddie v. Connecticut, 401 U.S. 371 at 377, 379-380 (1971) makes it clear that

> "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims or right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U.S. 377.
>
> "What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965) ... "for (a) hearing appropriate to the nature of the case," ... The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings...." 401 U.S. 378.

Justice Black in his opinion in Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971), stated:

> "I dissented in Boddie v. Connecticut ... but now believe that if the decision in that case is to continue to be the law, it cannot and should not be restricted to persons seeking a divorce. It is bound to be expanded to all civil cases. Persons seeking a divorce are no different from other members of society who must resort to the judicial process for resolution of their disputes. Consistent with the Equal Protection Clause of the Constitution, special favors cannot and should not be accorded to divorce litigants." 402 U.S. 954, note 1.

Also, Justice Black said:

> "...There is simply no fairness or justice in a legal system which pays indigents' costs to get divorces and does not aid them in other civil cases which are frequently of far greater importance to society." 402 U.S. 960.

The Second Circuit has already recognized the fundamental right of persons to be heard in Winters v. Miller, 446 F.2d 65 (2nd Cir. 1971), in which the Court said:

> "Under our Constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal. As Mr. Justice Frankfurter noted in his concurrence in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951):
>
> > "This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardship of a criminal conviction, is a principal basic to our society." 446 F.2d 71.

Plaintiff and his clients are being denied a meaningful opportunity to petition the courts for a redress of their grievances because of the prohibition of DR 7-109C. Antitrust litigation is more than the payment of a $15 filing fee to commence the action. Instead, it is a lengthy period of economic warfare, ending in the plaintiffs' inability to provide vital testimony because of DR 7-109C. Survival to the time of trial has no meaning if at the time of trial the antitrust plaintiffs cannot offer the needed expert testimony, which is what is happening to plaintiff and his Nabcor Clients.

Irrational regulation of the legal profession cannot be used as a guise to deny meaningful opportunities for persons to be heard in the courts.

Furthermore, the manner of adoption of DR 7-109C was through unconstitutional delegation of legislative authority to competitors of

of plaintiff in the legal profession, for the benefit of competitors of plaintiff's clients -- all without legislative input or review. This amounts to a denial of due process.

See Judge Dooling's opinion (JA 148) for additional discussion of the Fourteenth Amendment issue, which discussion need not be repeated here.

Defendants rely heavily on the right of the New York Appellate Divisions to regulate the conduct of judicial proceedings and the legal profession, but this reliance fails to provide the needed justification for the Rule. The Appellate Divisions have not prohibited contingent-fee expert testimony in various situations, including the situation where a party is not represented by an attorney. Logically, the prohibition would have been across-the-board if the State truly had condluded that prohibition of contingent-fee testimony was necessary to prevent perjured and fraudulent testimony. But the Appellate Divisions have permitted (without any independent review) a group of attorneys (in bar associations across the State and country) to adopt a Rule prohibiting all attorneys from using expert witnesses on a contingent-fee basis. This was without any showing or basis for any reasonable belief that lawyers tend to participate in fraudulent testimony more so than parties without attorneys representing them. Such conclusion is illogical and contrary to court rules and practice which permit attorneys to be employed on a contingent-fee basis.

CONCLUSION

It is respectfully urged that DR 7-109C be held to be irrational and discriminatory without sufficient State interest, and that the judgment of the District Court be affirmed.

Dated: New York, New York
December 17, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

CARL E. PERSON, :

Plaintiff-Appellee, : No.

-against- : 76-7457

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE, : AFFIDAVIT OF SERVICE

Defendants-Appellants. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ELIZABETH C. DROSER, being duly sworn, deposes and says:

That on the 17th day of December, 1976, affiant served 3 copies of the annexed and foregoing BRIEF OF PLAINTIFF-APPELLEE (hereinafter referred to as the "Document") on the ATTORNEY GENERAL OF NEW YORK STATE, LOUIS J. LEFKOWITZ, ESQ., by depositing the document in a securely-wrapped envelope, addressed to Daniel M. Cohen, Esq., Assistant Attorney General of New York State, 2 World Trade Center - 47th Floor, New York, New York 10047, the attorney for the Attorney General*, the last known address of said attorney, with first-class postage pre-paid, in the United States Post Office Box maintained by the United States Postal Service at 132 Nassau Street, in the City, County and State of New York.

*and 1st and 2nd Appellate Divisions.

Elizabeth C. Droser
Elizabeth C. Droser

Subscribed and sworn to before me
this 17th day of December, 1976.

Ira J. Ehrlich
Notary Public

IRA J. EHRLICH
NOTARY PUBLIC, State of New York
No. 31-4600212
Qualified in New York County
Commission Expires March 30, 1977